

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

Number: **201016033**
Release Date: 4/23/2010

Third Party Communication: None
Date of Communication: Not Applicable
Person To Contact:

Index Number: 664.03-02, 2036.02-00,
2055.12-05

Telephone Number:

Refer Reply To:
CC:PSI:1
PLR-135055-09
Date:
January 12, 2010

Legend

Trust =

Foundation =

Husband =

Wife =

Son =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Date 6 =

State =

Z =

State Court =

Drafting =

Attorney

Dear :

This letter responds to the letter dated July 20, 2009, submitted on Trust's behalf by Trust's authorized representative, requesting a ruling under § 664 of the Internal Revenue Code.

FACTS

The facts and representations submitted are summarized as follows:

Husband incorporated Foundation under the laws of State on Date 1. On Date 2, the Internal Revenue Service issued a determination letter concluding that Foundation is exempt from Federal income tax under § 501(a) as an organization described in § 501(c)(3). The determination letter also concluded that Foundation is a private foundation within the meaning of § 509(a).

On Date 3, Wife and Husband (Trustors) established Trust with Son as the trustee and income beneficiary, with the intent that Trust would qualify as a charitable remainder unitrust (CRUT) described in § 664(d)(2).

Article 3 of Trust provides that the annual unitrust amount is equal to z percent of the net fair market value of Trust property, valued as of the first day of the first calendar month in each taxable year of Trust. Article 4 provides that in each taxable year, the trustee will pay the entire unitrust amount, outright and free of trust, to Son during his lifetime.

Article 5, Section 1 of Trust provides that upon the death of Son, Trust will terminate and the trustee will distribute all of its principal and income, other than any amount then due to the surviving beneficiary and his estate, to Foundation. Article 5, Section 2 provides that Husband and Wife reserve the right, while both are living, to amend or revoke all or any portion of the interest of any one or more charitable remaindermen and to appoint a remainder interest in Trust to one or more substitute or additional qualified charitable remaindermen in such amounts and in such proportions as they deem appropriate. If either Husband or Wife has died, the survivor may exercise this right.

Article 5, Section 3 of Trust provides that “[i]n all events, any charitable remainderman designated in accordance with any section of this agreement must be a Qualified Organization as defined in Article 13 of this agreement.” Article 13 defines “Qualified Organization” as “an organization of a type described in each of” §§ 170(b)(1)(A), 170(c), 2055(a), and 2522(a).

Husband died on Date 4. After Husband’s death, Son became aware of a scrivener’s error in the trust instrument of Trust. Drafting Attorney prepared Trust. Drafting Attorney represents that the inclusion in Trust of the requirement that an organization be described in § 170(b)(1)(A) to be considered a “Qualified Organization” under Article 13 was a scrivener’s error. Drafting Attorney used a master form that included the reference to § 170(b)(1)(A) to draft Trust. Drafting Attorney inadvertently failed to delete the requirement to satisfy § 170(b)(1)(A) for Trust.

The requirement to satisfy § 170(b)(1)(A) is inconsistent with the designation of Foundation as the charitable beneficiary of Trust in Article 5. Foundation is an organization described in §§ 170(c), 2055(a), and 2522(a), but is not an organization described in § 170(b)(1)(A). Accordingly, the provision in Article 5 that requires the charitable remainderman to be a “Qualified Organization” prevents Foundation from qualifying as the charitable remainderman of Trust, despite the designation of Foundation as the charitable remainderman in the trust instrument.

On Date 5, Son, as trustee and beneficiary of Trust, filed a petition in State Court. The petition requested the court’s approval to correct the scrivener’s error by reforming the trust *ab initio* to delete the reference to § 170(b)(1)(A) in the definition of “Qualified Organization” in Article 13.

On Date 6, State Court issued an “Order Regarding Construction of Irrevocable Trust and for Approval of Modification of Irrevocable Trust” that granted the relief requested in Trust’s petition, contingent upon the issuance of a favorable private letter ruling by the Service. State Court determined that this modification of Trust was necessary to correct a scrivener’s / drafting error in Trust, to serve the original intentions of the trustors, and to carry out the primary purposes of Trust.

Trust requests two rulings:

1. The judicial reformation of Trust to delete compliance with § 170(b)(1)(A) as a requirement of eligibility to be a charitable remainder beneficiary under Trust will not cause Trust to fail to qualify as a CRUT within the meaning of § 664.
2. Only the remainder interest in the portion of Trust contributed by a Trustor will be included in the Trustor’s estate under § 2036 or 2038, and that remainder interest will be fully offset by a charitable deduction under § 2055.

LAW AND ANALYSIS

Ruling 1

Section 664(d)(2) provides that a CRUT is a trust—

(A) from which a fixed percentage (which is not less than 5 percent nor more than 50 percent) of the net fair market value of its assets, valued annually, is to be paid, not less often than annually, to one or more persons (at least one of which is not an organization described in § 170(c) and, in the case of individuals, only to an individual who is living at the time of the creation of the trust) for a term of years (not in excess of 20 years) or for the life or lives of such individual or individuals,

(B) from which no amount other than the payments described in § 664(d)(2)(A) and other than qualified gratuitous transfers described in § 664(d)(2)(C) may be paid to or for the use of any person other than an organization described in § 170(c),

(C) following the termination of the payments described in § 664(d)(2)(A), the remainder interest in the trust is to be transferred to, or for the use of, an organization described in § 170(c) or is to be retained by the trust for such a use or, to the extent the remainder interest is in qualified employer securities (as defined in § 664(g)(4)), all or part of such securities are to be transferred to an employee stock ownership plan (as defined in § 4975(e)(7)) in a qualified gratuitous transfer (as defined by § 664(g)), and

(D) with respect to each contribution of property to the trust, the value (determined under § 7520), of such remainder interest in such property is at least 10 percent of the net fair market value of such property as of the date such property is contributed to the trust.

Section 1.664-1(a)(1)(iii)(a) of the Income Tax Regulations provides that the term “charitable remainder trust” means a trust with respect to which a deduction is allowable under §§ 170, 2055, 2106, or 2522 and that meets the description of a charitable remainder annuity trust (as described in § 1.664-2) or a charitable remainder unitrust (as described in § 1.664-3).

Section 1.664-3(a)(3)(ii) provides that a trust is not a CRUT if any person has the power to alter the amount paid to any named person other than an organization described in § 170(c), if such power would cause any person to be treated as the owner of the trust, or any portion thereof, if subpart E, part 1, subchapter J, chapter 1, subtitle A of the Code were applicable to such trust.

Section 1.664-3(a)(4) provides that the trust may not be subject to a power to invade, alter, amend, or revoke for the beneficial use of a person other than an organization described in § 170(c). However, the grantor may retain the power exercisable only by will to revoke or terminate the interest of any recipient other than an organization described in § 170(c).

Under Rev. Rul. 76-8, 1976-1 C.B. 179, a trust that otherwise qualifies as a CRUT may provide that the grantor or a recipient of the unitrust amount may have the power to designate the remainder beneficiary if the remainder beneficiary must be a charitable organization described in §§ 170(c), 2055(a), and 2522(a). The ruling does not require that the remainder beneficiary must also be an organization described in § 170(b)(1)(A).

Based solely on the facts and representations submitted, we conclude that the proposed reformation will not violate § 664 and the regulations thereunder. Because the proposed reformation merely corrects a scrivener’s error in the original trust instrument and is in accordance with the original intent of Husband and Wife, the

proposed reformation will not violate the requirement that the remainder interest to charity must be irrevocable. Accordingly, we conclude that the proposed reformation of Trust will not adversely affect Trust's qualification as a CRUT if it otherwise meets the requirements of § 664 and the applicable regulations.

The percentage limitations set forth in § 170(b)(1)(B) that are applicable to charitable contributions to private foundations (that are not otherwise described in § 170(b)(1)(F)) may limit the amount of Husband's and Wife's charitable contribution deductions for income tax purposes. Similarly, the amount of Husband's and Wife's charitable contribution deductions may also be limited by § 170(e)(1)(B)(ii). See Rev. Rul. 79-368, 1979-2 C.B. 109.

Ruling 2

Section 2033 provides that the value of the gross estate shall include the value of all property to the extent of the interest therein of the decedent at the time of his/her death.

Section 2036(a) provides that the value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which the decedent has retained for life or for any period not ascertainable without reference to the decedent's death or for any period which does not in fact end before the decedent's death —

- (1) the possession or enjoyment of, or the right to the income from, the property, or
- (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom.

Section 20.2036-1(a) of the Estate Tax Regulations states that if the decedent retained or reserved an interest or right with respect to all of the property transferred, the amount to be included in the decedent's gross estate is the value of the entire property, less only the value of any outstanding income interest which is not subject to the decedent's interest or right and which is actually being enjoyed by another person at the time of the decedent's death. If the decedent retained or reserved an interest or right with respect to a part only of the property transferred by him, the amount to be included in his gross estate under § 2036 is only a corresponding proportion of the amount described in the preceding sentence.

Section 2038(a) provides, in relevant part, that the value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in the case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through

the exercise of a power (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person (without regard to when or from what source the decedent acquired such power), to alter, amend, revoke, or terminate, or where any such power is relinquished during the 3-year period ending on the date of the decedent's death.

Under § 2055(a)(2), for estate tax purposes, the value of the taxable estate shall be determined by deducting from the value of the gross estate the amount of all bequests, legacies, devises, or transfers to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes.

Section 2055(e)(2) provides, in relevant part, that where an interest in property (other than an interest described in § 170(f)(3)(B)) passes or has passed from the decedent to a person, or for a use, described in § 2055(a), and an interest (other than an interest which is extinguished upon the decedent's death) in the same property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to a person, or for a use, not described in § 2055(a), no deduction shall be allowed under this section for the interest which passes or has passed to the person, or for the use, described in § 2055(a) unless, in the case of a remainder interest, such interest is in a trust which is a charitable remainder annuity trust or a charitable remainder unitrust (described in § 664) or a pooled income fund (described in § 642(c)(5)).

In the instant case, Husband transferred property to Trust and, at his death, he had the retained power, together with Wife, to substitute the charitable remainderman designated in the instrument with one or more alternate qualified organizations. Since at his death, Husband's power to designate the persons or organizations who shall enjoy the assets of Trust extended only to the enjoyment of the charitable remainder interest, only the charitable remainder interest is includible in Husband's gross estate under §§ 2036 and 2038.

In view of our ruling under § 664 that the proposed reformation of Trust will not adversely affect Trust's qualification as a charitable remainder unitrust, we conclude that the interest passing to Foundation is a charitable remainder interest in a trust that is a charitable remainder unitrust (so long as it otherwise meets the requirements of § 664 and the applicable regulations). Accordingly, Husband's estate will qualify for an estate tax deduction under § 2055 equal to the amount of Trust corpus included in Husband's gross estate.

This ruling is directed only to the taxpayers who requested it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

The ruling contained in this letter is based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed

by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter. Specifically, no opinion is expressed concerning whether Trust is or was a charitable remainder trust within the meaning of § 664.

Pursuant to a power of attorney on file with this office, a copy of this letter is being sent to Trust's authorized representative.

Sincerely yours,

David R. Haglund

David R. Haglund

Chief, Branch 1

Office of the Associate Chief Counsel

(Passthroughs and Special Industries)

Enclosure: Copy for section 6110 purposes

cc: